Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1749

PHILIP TOIA, acting Commissioner of Social Services of the State of New York and the Department of Social Services of the State of New York,

Appellant,

against

ELIZABETH LINDA KLEIN, "JANE DOE" and "JANE ROE" on behalf of themselves and all other similarly situated women who received Medicaid from the State of New York, County of Suffolk and/or County of Nassau in the State of New York which Class of Persons are very numerous, the exact number of which can not be ascertained,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

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No. 75-

PHILIP TOIA, acting Commissioner of Social Services of the State of New York and the Department of Social Services of the State of New York,

Appellant,

against

ELIZABETH LINDA KLEIN, "JANE DOE" and "JANE ROE" on behalf of themselves and all other similarly situated women who received Medicaid from the State of New York, County of Suffolk and/or County of Nassau in the State of New York which Class of Persons are very numerous, the exact number of which can not be ascertained,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the order of the United States District Court for the Eastern District of New York entered on March 10, 1976, which declared unconstitutional and enjoined Administrative Letters 71 PWD-17 and 72 PWD-27 issued by the former State Commissioner of Social Services, George K. Wyman.

Opinions Below

The initial opinion of the three-judge court declaring and enjoining unconstitutional the above letters, dated August 24, 1972, is reported at 347 F. Supp. 496 (E.D.N.Y. 1972).

The decision of this Court vacating the order is found at 412 U.S. 925 (1973).

The opinion and order of the three-judge court once again declaring unconstitutional and enjoining the letter is unreported and is reproduced herein as Appendix "A" (1a).

Jurisdiction

The judgment of the District Court was entered March 10, 1976. The notice of appeal was filed April 7, 1976, Appendix "B" (6a).

The jurisdiction of this Court to review the instant order is conferred by 28 U.S.C. § 1253.

Regulation Involved

The administrative letter 71 PWD-17 enjoined reads as follows:

> "Subject. Clarification of Policies Relating to Reimbursement for Abortions
>
> A number of people have indicated recently their belief that elective abortions not medically indicated are reimbursable under the Medicaid program. These members of the public may have been misled by the wording of the captions to the pertinent fee schedules, '*Elective* Induced Abortions' (Emphasis added).

> This impression is clearly contrary to well established policy, embodied in the Social Services Law, the rules of the Board of Social Welfare and the regulations of the Department of Social Services under which only necessary and medically indicated care is covered by Medicaid.
>
> In order to obviate any misunderstanding that may persist, pertinent provisions of law and Board rules are reiterated below.
>
> Subdivision 2 of section 365-a of the Social Services Law defines medical assistance to mean payment of:
>
> 'the cost of care, services and supplies *which are necessary* to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with the provisions of this title, the rules of the board and the regulations of the department'. (emphasis added)
>
> Section 90.1 of the rules of the State Board of Social Welfare reads as follows:
>
> 'Medical care shall mean *necessary* preventive, diagnostic, corrective and curative services, and supplies essential thereto, provided by qualified medical and related personnel for conditions in a person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activities, or threaten some significant handicap.' (emphasis added)
>
> In addition, the misleading captions of the fee schedules have been changed to clarify and reinforce this policy.
>
> I trust that this letter will put to rest all questions about medicaid coverage of abortions and that you

will take immediate steps to make this reaffirmation of policy as widely known as possible.

April 8, 1971

/s/ George K. Wyman
Commissioner"

72 PWD-27 is simply a restatement.

Statement of the Case

Appellees commenced this action in 1972 seeking declaratory and injunctive relief (28 U.S.C. §§ 2201, 2202) against enforcement of the Administrative Letter insofar as it denies Medicaid reimbursement for non-medically indicated abortions.

Asserting federal jurisdiction under 28 U.S.C. §§ 1343(3) and (4), appellees alleged that the regulation in question violated rights secured to them under the Ninth and Fourteenth Amendments to the Constitution, as implemented by the Civil Rights Act (42 U.S.C. § 1983), and also violated the Federal Social Security Act (42 U.S.C. § 1396 *et seq.*).

In 1966, the New York State Legislature enacted a comprehensive medical aid program for indigent persons following the enactment of Federal Social Security Act, 42 U.S.C. § 1396, *et seq.*, commonly known as "Medicaid". New York Social Services Law § 365-a defined medical assistance under this program to mean payment of "the cost of care, services and supplies which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity or threaten some significant handicap . . ."

On July 1, 1970 [unrelated thereto], § 125.05 of the New York State Penal Law was amended to exempt from criminal sanction any abortions within the first 24 weeks of pregnancy. See *Byrn* v. *Health & Hospitals Corp.*, 31 N Y 2d 194, 286 N E 2d 887, 335 NYS 2d 390, app. dism., 410 U.S. 949, reh. den. 411 U.S. 929.

On April 8, 1971, the then defendant State Commissioner* George K. Wyman issued the Administrative Letter titled "Clarification of Policies Relating to Reimbursement for Abortions." The letter was a reminder to local officials that elective abortions which are not medically indicated are not reimbursable under the Medicaid program since they are not the necessary and medically indicated treatment within the meaning of § 365-a of the New York Social Services Law and 18 NYCRR 90.1 of the Rules of the New York State Board of Social Welfare.

This "reminder" was challenged in the New York courts. See *Matter of City of New York* v. *Wyman,* 66 Misc 2d 402, 321 NYS 2d 695, *aff'd.* 37 A D 2d 700, 322 NYS 2d 957. Thereafter the New York Court of Appeals reversed the lower court decisions and upheld the validity of the administration letter on both state law and constitutional grounds, on the dissenting opinion in Appellate Division. *Matter of City of New York* v. *Wyman,* 30 N Y 2d 537, 281 N.E. 2d 180 (1972).

The initial court had upheld the need of the City as *parens patria* to maintain the action and had nullified the regulation on constitutional grounds. The Appellate Division (majority) affirmed upon statutory grounds. The dissenting justice passed on the constitutional challenge and upheld the regulation. The Court of Appeals reversed

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* The addition by appellees of "The Department of Social Services of the State of New York" as a defendant was untenable. The State or its agencies may not be sued in the federal court without its consent under the Eleventh Amendment and are not persons within the Civil Rights Act (28 U.S.C. § 1343, § 1983). Such defendant should have been dismissed for these reasons, apart from the absence of merit.

on the opinion of the dissenting justice instead of seeking review in this court, the federal district court action was instituted despite the fact that it was unclear from appellees' moving papers in 1972 whether their medical situation fell within the terms of the statute as thus construed and whether or not in fact they required medically indicated abortions.

Appellee Klein, who alleged that she was a resident of Suffolk County, claimed that she had applied to the Nassau County Medical Center for a non-medically indicated abortion and had been denied such service by the hospital on the basis of directives of the State and of Nassau County. Appellee, however, had never presented herself to the Nassau County Medical Center to determine whether an abortion in her case was medically indicated. The state directive simply stated there would be no reimbursement for non-medically indicated abortions.

The State appellant continuously from 1972 on has taken the position that the decision to recommend or perform an abortion involves the clinical judgment and personal concern of each physician. The State Department of Social Services has not and will not question the medical determination of a physician who decides that an abortion is medically indicated.

By an opinion and order dated August 24, 1972, reported 347 F. Supp. 496 the three-judge district court held that the directive was invalid in that indigent women alone were subjected to state coercion to bear children they did not wish to bear.

The defendants took an appeal to this Court and this Court vacated the order of the district court "for further consideration in light of *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973)". Reported at 412 U.S. 925. While there were some proceedings immediately (a conference memo) after remand, some two years

passed before appellees or "plaintiffs" moved for summary judgment to reinstate the earlier decision (September, 1975). On affidavits over one year old, the "plaintiffs" requested the same relief as before.

On March 10, 1976, the three-judge court filed its unanimous opinion and order that the directives 71 PWD-17 (and 72 PWD-27) were unconstitutional as written and as applied and enjoined their operation (Appendix "A").

The decision of the three-judge court construed the administrative letter as *explicitly* ruling that "elective abortions not medically indicated" are not covered by the New York Medicaid Program (N.Y.) Social Services Law § 365-a. It was determined that the action was not moot despite the concession by plaintiffs that the Nassau County Medical Center no longer refused to perform abortions for indigent women or that Medicaid reimbursement had been refused. The Court adhered to its earlier decision that the Administrative Letter is a denial of equal protection of the laws. It enjoined the operation of the Administrative Letter(s).

A stay of the order appealed from was denied by this Court, April 26, 1976.

Questions Presented

1. Is New York constitutionally required to provide Medicaid reimbursement for *all* abortions requested by indigent women regardless of whether such abortions are medically indicated or necessary, the standard that applies to all medical care, services and supplies provided under the program?

2. Was this action moot?

The Questions Presented on This Appeal Are Substantial

1. There Is No Constitutionally Tenable Challenge by Reason of the State Limitation of Medicaid to Medically Indicated Abortions

The question whether the equal protection clause of the Fourteenth Amendment mandates that a state which participates in the federal medicaid program, Title XIX of the Social Security Law, fund non-medically indicated abortions has not been ruled on by this Court. The opinion by this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973) did not deal with such questions and furnishes no support for any such requirement.* There is presently pending before this Court an appeal by the State of Connecticut from a similar decision of a three-judge court. *Roe* v. *Norton*, 408 F. Supp. 660 (D. Conn. 1975), on app. *sub nom., Maher* v. *Roe*, 75-1440 (filed April 9, 1976).**

New York, as Connecticut, has limited reimbursement under the medicaid program to those medically necessary,

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* The instant appeal deals with the earliest litigation as to the scope of medicaid coverage of abortions, see 74 Columbia L. Rev. 237, 249-250 (1974). The remand in the instant case has caused some puzzlement. 74 Columbia L. Rev., *supra* at 250.

** While Connecticut does require the attending physician to certify that the abortion is either medically or psychiatrically necessary for the patients' health (*Maher*, Jurisdictional Statement, p. 3) and this certification must be prior to the abortion (*Maher*, J.S., App. "E", p. 33, Question 4), New York does not require prior approval and assumes from the physician's subsequent application the abortion was medically indicated and therefore reimbursable. This is the same reimbursement procedure as with any other covered medicaid service in New York. Thus the plaintiffs are not treated any differently from the medically indigent who require other necessary services. *Cf. Ramey* v. *Rockefeller*, 348 F.Supp. 780, 788-790 (E.D.N.Y. 1972) (as to voting, residence and presumptions). In this respect, the New York practice is less subject to any constitutional challenge.

and this includes abortions. This does not violate the Social Security Act; *Roe* v. *Norton*, 522 F. 2d 928 (2d Cir. 1975). It certainly does not follow and there has been no proof that *all* abortions are necessary for a woman's health. "Medical necessity" is the uniform standard for coverage under the New York medicaid program. In line with this New York does pay for all abortions which are medically necessary in the view of the woman's attending physician.

In making its decision, the district court continued, see 347 F. Supp. 496, *supra*, to miss the focus of the medicaid program in New York. It is neither on pregnancy or abortion. Rather it is a program designed to provide medical services necessary for the eligible recipient's health. As such the Administrative Letter (71 PWD-17) simply placed medicaid payment for abortion in the same category as every other covered service. New York Social Services Law § 365-a (2) and § 90.1 of the Rules of the State Board of Social Welfare.

While the Letter spoke to abortions it did not discriminate against abortions as a necessary medical service under medicaid. Simply because the woman's right to choose on abortion is constitutionally protected, *Roe* v. *Wade, supra*, it does not follow that state payment for same is mandated. There is no constitutional requirement that the State must finance exercise of a fundamental right and a distinction between medically necessary and non-necessary abortions is a rational classification.

This Court in *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972), recognized that not every limitation on the exercise of a constitutional right is subject to a stringent standard of review. There this Court was dealing with voting rights, here with the right of a woman not to be prohibited by State policy from an abortion. Yet according to *Bullock*, at 143, "it is essential to examine in a realistic light the extent and nature [of the policy and its impact]". See too:

Frontiero v. *Richardson,* 411 U.S. 677, 682 (1973). Thus this Court has held that not every sex discrimination involves a fundamental right. *Kahn, etc.* v. *Shevin,* 416 U.S. 351 (1974); and as to education *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973), reh. den. 411 U.S. 959, there is no fundamental right.

The inevitable conclusion is that since there is no constitutional entitlement to medicaid, the State limitation which excludes non-medically indicated abortions from the benefits of medicaid should be upheld since it has a reasonable basis in the distinction. *Richardson* v. *Belcher,* 404 U.S. 78, 81 (1971). The New York limitation is in accord with the federal medicaid law, as found by the district court here itself, to medical assistance and cannot be criticized as lacking in a reasonable basis.*

The classification in question is reasonable and is intended to provide maximum resources under the Medicaid program for medically indicated treatment and as such clearly rests on a reasonable basis. See *Dandridge* v. *Williams,* 397 U.S. 471, at 485 (1970):

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"

There is a clear and rational basis for distinction between medically indicated and non-medically indicated abortions. To require the State to allocate funds for operations and other medical services which are not medi-

* In *Roe* v. *Wade,* this Court stressed the "medical judgment" as to the termination of pregnancy 410 U.S. at 163.

cally indicated might well lead to the curtailment of required services for some medically indigent persons. The vacated finding of the three-judge court, reaffirmed in the order appealed from, that the policy of the Department of Social Services to deny reimbursement for abortions unless medically indicated would cost the State more money than paying for all abortions was speculative and without proof. The court below failed to take into account the fact that if the State is required to reimburse expenses for non-medically necessary abortions, it may open itself equally to reimbursing other non-indicated services and operations such as sterilizations and plastic surgery, which the indigent may determine for himself or herself is "necessary". Cf. *Matter of Ferro* v. *Lavine,* 46 A D 2d 313 (3rd Dept. 1974), which required medicaid sterilizations as part of family planning services. In addition, it should be noted that the ready availability of free abortions may have a tendency to promote abortion as a costly and complex method of birth control.

The Supreme Court has noted that "The constitution does not empower this Court to second-guess state officials charged with the difficult task of allocating limited public welfare funds among the myriad of potential recipient." *Dandridge* v. *Williams, supra; Jefferson* v. *Hackney,* 406 U.S. 535 (1972).

Finally, denial of medicaid for abortions does not constitute a denial of equal protection in that a person with money can still obtain an abortion while the indigent cannot. The mere fact that a right can be more readily enforced by those with money does not constitute a denial of equal protection. The fact that the rich may be able to pay for travel, contraceptive devices or send their children to private schools does not require the state to pay for such services to equalize everyone. *City of New York* v. *Wyman,* 37 A D 2d 700, 701 (1st Dept. 1971), rev. 30 N Y 2d 537 (1972). The decision of the three-judge

court in *Doe* v. *Bolton,* 319 F. Supp. 1048, 1056 (N.D. Ga. 1970), modif. and aff. 410 U.S. 179 (1973), noted that the fact that abortions can more readily be obtained by those with money does not constitute a denial of equal protection.

> "When abortions may be obtained only from licensed physicians and surgeons and only after psychiatric consultation, the mere fact that physicians and psychiatrists are more available to rich people than to poor people, making abortions more available to the wealthy than to the indigent, is not in itself a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Cf. *Dandridge* v. *Williams* (citations omitted)."

In *Doe,* 410 U.S., at 200-201, the Supreme Court inferred that equal protection was not violated because the wealthy may have easier access to abortions than the poor.

Certainly, the policy of paying for the costs of pregnancy as medically indicated expenses while denying reimbursement for non-medically indicated abortions raised no equal protection problems. Given the fact that a physician has to perform the abortion, and the assumption by the appellant that by application of the doctor for reimbursement that the services were medically indicated and necessary, no denial of equal protection can be isolated. There is no significant impact on the availability of medicaid. *Cf. Bullock* v. *Carter, supra,* 405 U.S. at 143.

With regard to the pending Connecticut appeal, obviously if probable jurisdiction is noted in *Maher* v. *Roe, supra,* it is warranted herein. However, even if not, the significant lack of any difference in procedure for obtaining reimbursement from Medicaid in New York from any other covered procedure or service warrants noting probable jurisdiction.

Simply because payment for abortions is involved, it does not follow that abortions are exempted from the

uniform standard of "medical necessity" as found in New York law and allowed by federal statute. This is the extent of the State's commitment to provide medical assistance. See *Doe* v. *Beal,* 523 F.2d 611, 624, 633 (3rd Cir. 1975) (dissent), *cert. appl. pdg.* The Equal Protection clause was never intended to cure all panaceas, or provide Utopian solutions, to all problems, incident to the condition of poverty, in this case the inability of an indigent pregnant woman to privately finance her non-medically necessary abortion. *Doe, supra,* 523 F.2d at 635 (dissent).

2. There was a Lack of a Real Case or Controversy

At the time of the original decision, *supra,* 347 F. Supp. 496, the instant action was made a class action as to a class of medically indigent pregnant women who apply for abortions at the Nassau County Medical Center (in Nassau County) without showing that abortion is "medically indicated", *id.* at 499. This was in 1972. In the plaintiffs' 9(g) Statement, No. 11* (September 29, 1975) it was admitted and clearly stated that the Medical Center had been unconditionally reimbursed for abortions, as for any other service. Thus it was clear that plaintiffs conceded there was no actual case presenting concrete legal issues. *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969).

The plaintiffs presented letters and affidavits and local letters from other counties (Upstate) over a year old, (August, 1974) of "problems" involved in obtaining medicaid practices. In any event these matters did not involve the Nassau County plaintiffs or their class. There was no motion to intervene by any "live" plaintiff.

Given the several years between the original vacated decision and the instant decision, the lower court erred in finding a real case. The District Court was dealing with

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* A local rule specifying uncontroverted facts for summary judgment.

a hypothetical denial of medicaid.* Truly even if this were an "actual case," the challenged letter had no impact on indigent women, viewed in a realistic light. *Bullock* v. *Carter, supra.*

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Dated: New York, New York, May 27, 1976.

Respectfully submitted,

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* At the time of summary judgment, the Court had no member of the plaintiff class with a real controversy. See as to mootnesss, *Sosna* v. *Iowa,* 419 U.S. 393 (1975).

APPENDIX A

Decision and Order.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

72 C 386

ELIZABETH LINDA KLEIN, et al.,
Plaintiffs,

against

NASSAU COUNTY MEDICAL CENTER, et al.,
Defendants.

Appearances:

RHONDA COPELON, Esq. (Center for Constitutional Rights) and JEROME SEIDEL, Esq. (NANCY STEARNS, Esq., of Counsel) for plaintiffs

A. SETH GREENWALD, Esq. (LOUIS J. LEFKOWITZ, Esq., Attorney General, of Counsel) for the Commissioner of Social Services and the Department of Social Services

VINCENT ESPOSITO, Esq. (JOHN F. O'SHAUGHNESSY, Esq., County Attorney, of Counsel) for Nassau County Medical Center and the County defendants

Before: LUMBARD, Circuit Judge and
DOOLING and NEAHER, District Judges

PER CURIAM:

Following the earlier decision in this case (347 F.Supp. 496), the taking of the appeal from that decision, and

the Supreme Court's decisions in *Roe* v. *Wade,* 1973, 410 U.S. 113 and *Doe* v. *Bolton,* 1973, 410 U.S. 179, the Supreme Court affirmed the judgment denying the motion for preliminary injunction of the guardian for the interests of unborn children (1973, 412 U.S. 924) and vacated the remainder of the judgment "for further consideration in light of" *Wade* and *Bolton* (1973, 412 U.S. 925).

Plaintiffs now move, in effect, for summary judgment reinstating the earlier decision. That decision turned on Administrative Letters 71 PWD-17 of the Commissioner of Social Services, approved and interpreted in *Matter of City of New York* v. *Wyman,* 1972, 30 N.Y.2d 537, and reiterated in the Commissioner's Administrative Letter 72 PWD-27. The Administrative Letter explicitly ruled thta "elective abortions not medically indicated" are not reimbursable under Section 365-a of the Social Services Law because they are "not necessary and medically indicated," and, in consequence, are not covered by the statute and by Medicaid. The earlier decision of this Court concluded, *first,* that the Administrative Letter denied Medicaid reimbursement except where the abortional act was necessary to preserve the life or health of the mother, that such state action necessarily discriminated against the indigent by reason of their indigency and by reason of their having made a choice which the Penal Law § 125.05 legitimized, and that no identifiable state interest was served by the discrimination (347 F.Supp. at 500-501), and, *second,* that

> ". . . it may well be that a still more fundamental right is infringed whenever an attempt is made by statute or rule to deny, or, as here, substantially to interfere with, the pregnant woman's interest in freely determining whether or not to bear a child. *Abele* v. *Markle,* D.Conn. 1972, 342 F.Supp. 800, 804." (347 F.Supp. at 500)

The defendants were therefore ordered to cease giving effect to Administrative Letter 71 PWD-17.

The Attorney General argues that a "real case of controversy" is no longer presented. The claim is not that termination of plaintiffs' pregnancies has mooted the class action, a contention rejected in *Wade* (410 U.S. at 125), but that there is no showing that Nassau County Medical Center has refused to perform abortions for indigent women or that Medicaid reimbursement has been refused. The record, however, is clear that the Attorney General steadfastly maintains that Administrative Letter 71 PWD-17 is valid, argues that neither the Supreme Court nor the Legislature in removing penal sanctions "thereby opted for free abortions for indigents," and contends that the State had a reasonable basis for excluding reimbursement for voluntary abortions requested by indigents from the limited resources available for Medicaid. In a word, the State's position continues to be directly contrary to the earlier decision in this case. There is an indication that if physicians certify that the abortion is "medically indicated," the certificates are not in practice questioned, but there can be no assurance that the covert practice will continue when the State's official position continues to be what it is (*cf. Bullock* v. *Washington,* D.C. Cir. 1972, 468 F.2d 1096), and, moreover, such a dubious certfication practice is, in any event, not a legally tolerable substitute for a final clarification of the validity of the Administrative Letter.

There is no occasion to depart from the earlier determination that the Administrative Letter is invalid, and that it is a denial of the equal protection of the laws to deny medical assistance and Medicaid reimbursement for lawful abortional acts to indigent women who otherwise qualify for medical assistance under Section 365-a of the Social Services Law and the regulations. *Roe* v. *Norton,*

2d Cir. 1975, 522 F.2d 928, has since made it clear that the federal statute establishing the Medicaid program, 42 U.S.C. § 1396, *et seq.*, permits Medicaid coverage for nontherapeutic, elective abortons, but the Court noted tht the statute does not in terms forbid state plans which deny Medicaid coverage for such elective abortions, if the state may constitutionally do so. See also *Roe* v. *Ferguson,* 6th Cir. 1975, 515 F.2d 279; *cf. Wulff* v. *Singleton,* 8th Cir. 1975, 508 F.2d 1211 (cert. granted on limited issues, 1975, 43 L.W. 3674).

In agreement with the earlier decision in this Court, the three-judge Court in *Roe* v. *Norton* determined on remand that the state could not constitutionally deny medical assistance to indigent women seeking elective abortions in the first trimester of pregnancy (Civil No. N-74-17, December 31, 1975). The same conclusion has been reached in *Wulff* v. *Singleton, supra,* 508 F.2d at 1215-1216, *Doe* v. *Rose,* 10th Cir. 1974, 499 F.2d 112, 1116-1117, and *Doe* v. *Wholgemuth,* W.D. Pa. 1973, 376 F.Supp. 173, 190-191, aff'd on other grounds sub nom., *Doe* v. *Beal,* 3d Cir. 1975, 523 F.2d 611 (en banc).

Under the New York statute medical participation is an integral part of the procedure for legalizing an abortional act even during the first trimester. *Wade* is nevertheless clear that the generative source of right is the woman's protected freedom in the first trimester to make the decision whether or not to bear the child. See particularly *Wade,* 410 U.S. at 153; *Abele* v. *Markle,* D.Conn. 1972, 342 F.Supp. 800, 804. It is, then, under the New York statute appropriate for the Commissioner of Social Services to require adoption of a certification procedure that assures avoidance of risk of exposure to criminal liability on the part of the physician and patient and assures that the patient is eligible for medical assistance under the state plan, but the certification requirement must not

trammel the woman's underlying right of decision.

Further submissions on the Nassau County Medical Center residency regulations were promised but have not been submitted. That local aspect of the case, which is for the one-judge court in any case, is left open at this time.

It is, accordingly

ORDERED and ADJUDGED that Administrative Letters 71 PWD-17 and 72 PWD-27 are constitutionally invalid as written and as applied, and that the defendant Commissioner of Social Services and Department of Social Services of the State of New York cease and desist from giving effect to them in the cases of indigent women electing upon the advice of a duly licensed physician to abort their pregnancies within twenty-four weeks of the common cement of the pregnancies; and it is further

ORDERED that determination of plaintiffs' motion respecting the Nassau County Medical Center residency regulations is held in abeyance for separate determination by the District Court.

Brooklyn, New York, March 10, 1976.

s/ J. EDWARD LUMBARD
Circuit Judge

s/ JOHN F. DOOLING, JR.
District Judge

s/ EDWARD R. NEAHER
District Judge

APPENDIX B

Notice of Appeal to Supreme Court of the United States.

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 1253, the State defendants the Commissioner of Social Services of the State of New York (formerly) and the Department of Social Services, hereby appeal to the Supreme Court of the United States from a declaration and an order of unconstitutionality and injunction against 71 PWD-17 and 72 PWD-27, namely a state-wide Administrative Letter. The order appealed from is only that part enjoining the letters and was entered March 10, 1976.

Dated: New York, New York
April 6, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Defendants-
Appellants, Stephen Berger
and Department of Social
Services
By

s/ .....
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Appendix B.

To: CLERK
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EASTERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
225 Cadman Plaza East
Brooklyn, N.Y. 11201

RHONDA COPELON
Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003

JEROME SEIDEL
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Notice of Appeal Filed April 7, 1976